No. 12561

IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY,
a corporation,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD and
JOHN LANDRO,

Appellees,

Upon Appeal from the District Court for the
Territory of Alaska, First Division

BRIEF FOR APPELLEES

J. GERALD WILLIAMS and
JOHN DIMOND
for Alaska Industrial Board.

ROY E. JACKSON and
HENRY RODEN,
for Appellee John Landro

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BRIEF FOR APPELLEES

STATEMENT OF FACTS.

Since appellant's brief does not include all the facts which appellees consider relevant, a brief statement follows:

The appellant employed the appellee Landro as a fisherman to supply its cannery at Eklunk, in Bristol Bay, Alaska, with salmon during the season of 1948. On the evening of July 5th, the weather was rough.

His fishing boat was temporarily tied to a scow. In order to save the boat from destruction he jumped from the scow to the boat. The boat gave a heave which threw him off balance and he landed on top of an anchor on his back, causing him great pain and making walking impossible. The next day he attempted to fish again. Due to his crippled condition he fell, striking his back again. He peved one fish, his partners had to do the rest of the work. Remained in the local hospital until July 19, when he went to Seattle to consult the Insurance Carrier's physician, Doctor Gray; the latter told him he had a pretty bad back; that there was no fracture but it appeared that "a vertebra was dislocated." Received treatment to October 14, when Doctor Gray advised he try some light work. In November Doctor Gray advised him to seek a warmer climate; he went to California; no relief; returned to Seattle in January 1949; attempted to find light work; unsuccessful; could not do it on account of sharp pains in lower back; his legs would buckle up and "I would collapse;" this happened three times stepping off sidewalk and 3-4 times in his house while trying to pick up tools. In February 1949 called on Doctor LeCocq for examination. Advised might require operation. Also called on Doctor Wil--liams who also suggested possible operation. In March 1949 Doctor Gray advised him to get free treatment at the Sailors' Hospital in Seattle as Insurance Carrier would not furnish same. Went to sanatarium at St. Martin's hot springs. After three weeks there tried to find light work, which he was unable to do.

At time of hearing (May 26, 1949) his condition was "up and down; not good at all; it is such that I could not do any hard work; there are days that I might be able to do light work but other days I couldn't begin to do any work at all, due to the condition of my back; my legs pain me walking; after walking pain shoots down both legs; I am wearing a brace prescribed by Doctor Gray and adjusted by Doctor LeCocq; I have been wearing it ever since. I have been trying to walk without it but this gives me pain in the lower back and hips; before I went fishing I was first mate on a Liberty Ship; I am not able to do a mate's work since the injury; I haven't the strength to do it; it would be suicide for me to go fishing; I have tried to get light work as watchman or checker on the waterfront; never had to stop work on account of sickness; never had any trouble with my back before; I have done no work since the accident; two-thirds of the time I could not even do light work; Doctor LeCocq recommended treatment, not light work." Tr. pgs. 44-56.

The Industrial Board awarded Landro temporary disability compensation in conformity with the statute up to May 20, 1950.

On appeal the District Court affirmed the award. From this affirmance this appeal is prosecuted to this Honorable Court.

ARGUMENT

In its brief the appellant makes two points:

First: That the Industrial Board may not base its

Findings upon *ex parte*, or hearsay testimony; and

Second: That an attorney's fees cannot be assessed against the losing party on appeal from the Board's decision to the District Court.

We shall consider these points in the order presented.

FIRST—COMPETENT EVIDENCE

We agree that Findings of the Board must be supported by competent evidence and we respectfully suggest that such evidence is in the record of this case.

It is admitted that at the time of the accident the relation of employer-employee existed between appellant and Landro and that the accident arose out of and in the course of his employment.

It is also admitted that payment of temporary disability compensation was made to Landro up to October first, 1948. The Board allowed him temporary compensation up to May 20, 1949; hence the only fact to be established by competent evidence is that temporary disability continued up to May 20, 1949. What evidence is there to support this finding?

On May 26, 1950 the hearing was held before the Industrial Board. Landro, at that time testified with reference to his then condition:

> "My condition is up and down; it is not good at all. There are days when I might be able to do light work but other days I couldn't begin to

do any work at all; this is due to the condition of my back; my legs pain me when walking and after walking pains shoot down both legs. The hips pain all the time; I am wearing the brace prescribed by Doctor Gray and Dr. LeCocqq; walking without the brace gives me pain; I don't know what kind of work I can do;" Tr. pgs. 50 *et seq.* Never had any trouble with my back before; have not done any work since the accident because two thirds of the time I couldn't even do light work." Tr. pg. 55. "Doctor LeCocq did not suggest that I do light work, he recommended treatment." Tr. pg. 56.

In addition to the foregoing testimony it is proper to call the Court's attention to the fact that the injured employee appeared before the Industrial Board in person. The Board had an opportunity to consider the appearance and demeanor of the claimant and of his seeming health and ability to work. The inspection of a witness is often an important factor in the weight to be given to his statements and such observation constitutes additional evidence upon which a Finding may be predicated and justifies a Finding as to the nature of any injury even though the Record may be bare as to that phase.

We take the liberty of suggesting here that the Alaska Industrial Board, which understands local conditions and on account of constant contact with fishermen in this Territory, must be credited with having knowledge as to what is required of them in the performance of their duties is able to judge by their appearance, conduct and demeanor what amount of labor if any, they may be able to perform.

Appellant's physician, Doctor Gray, testifies that at the time Landro interviewed him in March 1949 he would have had a "very difficult time holding down a job requiring manual labor." Tr. pg. 96.

We believe that the evidence submitted by the claimant himself is, as the District Judge concluded, amply sufficient to sustain the findings of the Industrial Board.

However in addition to this the claimant introduced in evidence the statement of Doctor Williams who, upon examination of the claimant on May 20, 1950, found that he was then able to perform light work, if any available, but not regular labor. Tr. pg. 36.

He also introduced the report of Doctor LeCocq who, on February 4, 1949 examined the claimant and then reported his conclusion as follows:

> "This patient's condition at the present time is due to an increased dorsal rotundum with secondary accentuated compensatory lumbar lordosis. This is actually on a postural basis but has been *severely aggravated* by his fall incurred on July 5, 1948. Therefore it is felt that his condition is not fixed and that definite further treatment is in order at this time... If his course is not satisfactory by conservative measures, then the only alternative would be consideration of a localized spinal fusion." Tr. pg. 87.

The appellant claims these statements should not have been considered by the Board.

The Alaska Workmen's Compensation Act, section 43-3-13, Alaska Compiled Laws, 1949, reads:

"The Industrial Board may make rules not inconsistent with this Act for carrying out the provisions hereof."

Pursuant to this authority, the Industrial Board, among others, adopted its Rule Number 13, which reads:

"The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence. Hearsay evidence shall be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient of itself to support a finding."

Article 9(c), of the Rules adopted by the Industrial Board reads:

"The Board favors the production of medical evidence in the form of written reports. These reports should include:

1. History of the injury;
2. Source of all facts set forth in the history and complaints;
3. Findings on examination;
4. The patient's complaint;
5. Opinion as to the extent of disability and working ability;
6. Cause of the disability;
7. Medical treatment indicated;
8. Likelihood of permanent disability;
9. If permanent disability exists whether it is ready for rating;
10. The reasons for opinions."

Article 9 of the Board Rules reads:

"Article 9(d). Upon the filing with the Board an application or other pleading, all parties must immediately, or in any event, within five days after service of such pleading, send to the Board the original signed reports of all physicians relating to the proceedings which they may have in their possession or under their control. Copies shall be served forthwith on the adverse party.

"Article 9(e). All physicians' reports acquired by any of the parties during the pendency of the particular phase of the proceeding shall immediately, or in any event within five days of receipt, be sent to the Board and copies served on the adverse party.

"Article 9(h). If a party fails or refuses to comply with the foregoing provisions the Board may decline to receive in evidence any physician's report or other written testimony from a physician whose report has not been so filed. It shall be presumed that the report of evidence withheld in violation of said sections was wilfully suppressed and would be adverse if produced."

The statute just quoted deals with procedure only and not with any substantive rights and pursuant to it, the Board has authority to prescribe fair and reasonable rules and methods to be followed in proceedings pending before it. The reports of the two physicians were presented in accordance with these rules and the Board had the right to consider or reject them.

Under the common law of procedure substantative rights are governed by procedure; but this has been changed by the enactment of workmen's compensation acts; under them substantive rights control procedure and common law principles are not applicable.

The reports by the doctors, required as aforesaid, become part of the Board's file and con-

stitute a part of the record and may be considered by the Board though the sources of information on which they are based and the manner in which they become part of the file might affect their weight as evidence, they are nevertheless competent and admissible to be considered for what they are worth.

Devlin vs. Department of Labor 78 Pac. (2) 952.

"The manner in which they get into the record may affect their weight as evidence but, in our opinion, are not incompetent and may be considered by the Board for what they are worth."

McKinzie vs. Department of Labor, 37 Pac. (2) 218.

We respectfully repeat, that the record supports the Findings of the Board as found by the District Court.

The situation here is fully covered by the opinion of this Honorable Court in:

Contractors vs. Pillsbury, 150 Fed. (2) at page 312 where the Court, speaking by Honorable Circuit Judge Bone says:

"There was evidence covering material facts before the Commissioner which would support the order of award. Logical deductions and inferences which may be and are drawn by him from the evidence should be taken as established facts and are not judicially reviewable. Even if the evidence permits conflicting inferences the inference drawn by the Commissioner is not subject to review and will not be re-weighed. The Commissioner is not bound to accept the opinion or

theory of any particular medical expert but he may rely upon his own observation and judgment in conjunction with all of the evidence before him."

We repeat that we do not contend that hearsay testimony alone is sufficient to support a material Finding of the Board; but the Board may consider it when it is sustained by other competent evidence.

Appellant, in its Brief, cites a number of authorities holding that hearsay evidence alone is not sufficient to establish the essential facts of an accidental injury, such as:

*Lallier Construction Co. vs. Industrial Com*mission, 172 Pac. (2) 534, and others among them:

Employers etc. vs. Industrial A. C., 151 Pac. 423.

It will be noted that the holding in all these cases is that "hearsay evidence alone" is not sufficient, plainly indicating that, to a degree, it is admissible under the Workmen's Compensation Acts and will be given such weight as the hearing authority may deem it entitled to.

Point Two

Recovery of Attorney's Fee on Appeal.

The applicable provisions of the Alaska Workmen's Compensation Act read:

Section 43-3-17 ACL 1949:

"In all proceedings before the Industrial Board or in any court under this Act the costs shall be awarded and taxed as provided by law in ordinary civil actions in the District Court."

Costs in ordinary civil suits are governed by Section 55-11-51:

"The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney's fees in maintaining the action or defense thereto, which allowances are termed costs."

The court in Alaska has consistently allowed attorney fees as costs to the prevailing party, generally.

Pilgrim vs. Grant, 9 Alaska Reports 417.

And this Court has allowed attorney fees as costs.

Forno vs. Coyle, 75 Fed. (2) 692.

The District Court for the First Division of Alaska, has uniformly allowed attorney's fees as costs in appeals coming before it from the Industrial Board, viz:

J. H. Scott, vs. Alaska Industrial Board and Edward Erickson, decided June 10, 1950.

In conclusion we desire to repeat, what the Supreme Court of the United States, has stated in:

Tenant vs. Peoria Ry. Co., 321, 29, at pg. 35.

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury, on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal

points of judicial review is the reasonableness of the particular inferences or conclusions drawn by the jury. It is the jury, not the court, which is the fact finding body."

In the case at bar the Industrial Board was the fact finding body; its findings were supported by the finding of the District Court. We respectfully urge that the judgment of the District Court be sustained.

Respectfully submitted,

J. G. WILLIAMS and JOHN DIMOND
for Appellee Alaska Industrial Board

and R. E. JACKSON and HENRY RODEN
for Appellee Landro.